BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Courts Below.

The trial court rendered its Findings of Fact, Conclusions of Law and Decree on October 15, 1940. (R. 12-16.) The opinion is unreported. The opinion of the Supreme Court of Utah (R. 18-30) is reported in 128 Pac. (2d) 269 (Utah Report not yet published).

Grounds On Which Jurisdiction of Supreme Court of the United States Is Invoked.

The judgment of the Supreme Court of Utah was rendered on July 11, 1942 (R. 31). Petition for rehearing was denied on December 3, 1942. (R. 31). The Petition for Writ of Certiorari was filed March 3, 1943. The judgment of the Supreme Court of Utah is based upon its construction and application of a United States statute, Section 2324 Revised Statutes, Title 30, U. S. Code, Section 28. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 937, 28 U. S. Code Sec. 344 and the Act of February 13, 1925, c. 229, Sec. 8, 43 Stat. 940, 28 U. S. Code Sec. 350.

Statement of the Case.

In March, 1931, the Violet Ray Nos. 1 to 12 lode mining claims of respondent New Mercur Mining Company were located upon the public domain of the United States. (R. 9, 32.) On August 28, 1939, a Lease and Option Agreement (Exhibit 6, R. 9, 13, 18, 34, 39-45) covering these unpatented claims was entered into between respondent

New Mercur Mining Company and respondent The Snyder Mines, Incorporated. After noon September 1, 1939, petitioner, South Mercur Mining Company, located the Protection Nos. 1 to 15 lode mining claims covering the area theretofore embraced within the Violet Ray locations. (R. 4, 14, 18, 38-39.)

In November, 1939, respondents New Mercur Mining Company and The Snyder Mines, Incorporated, commenced this action in the District Court of Tooele County, Utah, to quiet title in respondent New Mercur Mining Company to said Violet Ray locations. (R. 1-2, 18.) Petitioner, named as the defendant in such proceeding, answered and counterclaimed asserting that the ground embraced within the Violet Ray locations was, after 12 o'clock noon September 1, 1939, open to location because of failure to perform for the Violet Ray locations the annual assessment labor required for the assessment period ending at 12 o'clock noon September 1, 1939, and that the Violet Ray locations were forfeited by the location of the Protection claims. (R. 3-9, 18.)

The Snyder Mines, Incorporated, was on September 1, 1939, and for a substantial period prior thereto had been, carrying on mining operations through the so-called "electric tunnel" on the patented property of the Consolidated Mercur Gold Mines Company. (R. 22-23.) These operations were conducted under a Lease and Option (Exhibit 8-A) granted by the Consolidated Mercur Gold Mines Company on June 11, 1934, to the Lewiston Peak Mining Company and on July 2, 1936 (R. 18, 34, 35, 39, 46-56), assigned by the latter to The Snyder Mines, Incorporated. (R. 45.)

The Supreme Court of Utah found and held that the only work which could be applicable as assessment work for the Violet Ray locations was "an extension of the 'electric tunnel' by leasers under lease No. 259 in a southeast-

erly directed toward the Violet Ray claims." (R. 20.) Lease 259, whereunder leasers of The Snyder Mines, Incorporated, were mining, had been in operation since March of 1939. (R. 22.)

The Supreme Court of Utah stated: "The question, then, of whether the New Mercur Mining Company suffered a forfeiture by appellant's act of relocating at 12 o'clock noon September 1, 1939, turns upon the activities of respondent, Snyder Mines, Incorporated, in the southeast heading of the 'electric tunnel' on or before 12 o'clock noon of September 1, 1939." (R. 21.)

The Supreme Court of Utah resolved this question in favor of respondents and thereby held that the requirements of the United States Statute (Title 30 U. S. Code Sec. 28) were satisfied as to the unpatented Violet Ray locations owned by one party (respondent New Mercur Mining Company) by work done by a second party (respondent The Snyder Mines, Incorporated) in mine workings ("electric tunnel") on nearby patented mining claims owned by a third party (Consolidated Mercur Gold Mines Company), although there was no contractual relationship of any sort between the respondent New Mercur Mining Company, the owner of the unpatented mining claims, and Consolidated Mercur Gold Mines Company, the owner of such patented mining claims and workings thereon. This case involves the question of whether the Utah Supreme Court correctly construed and applied the Federal statute in so holding. The Utah Supreme Court expressly recognized that its holding was "not free from doubt" (R. 26).

Statement of Error.

The Supreme Court of Utah erred in holding that work performed for The Snyder Mines, Incorporated on property of Consolidated Mercur Gold Mines Company was appli-

cable as annual assessment work required by the United States statute for the Violet Ray Nos. 1 to 12 unpatented lode mining claims of New Mercur Mining Company.

ARGUMENT.

United States Statutes Involved.

The pertinent statutory provisions involved in this case are U. S. Code, Title 30, Sec. 28 (R. S. 2324) and the Act of June 30, 1939 (c. 257, 53 Stat. 991).

U. S. Code, Title 30, Sec. 28 (R. S. 2324) includes the following provisions:

> * * * On each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent shall fail or refuse to contribute

his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by this section. On all such valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922.

The Act of June 30, 1939 (c. 257, 53 Stat. 991) reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to comply with the provisions of section 2324 of the Revised Statutes of the United States, which requires on each mining claim located, and until a patent has been issued therefor, not less than $100 worth of labor to be performed or improvements aggregating such amount to be made each year, it shall be sufficient, for the year beginning at 12 o'clock meridian July 1, 1938, if such work or improvements are in good faith commenced on or before 12 o'clock meridian September 1, 1939, and prosecuted with reasonable diligence to completion.

Opinions by the Supreme Court of the United States On the Policy and Meaning of These Statutes.

This Court has not decided the precise question involved. Its decisions, however, clearly show that the decision of the

Supreme Court of Utah is inconsistent not only with the express statutory provisions but with the policy and purpose underlying the statute.

Chambers v. *Harrington*, 111 U. S. 350, 28 L. Ed. 452, 4 S. Ct. 428.

After referring to the statute in question the court, on page 353, said:

> These mineral lands being thus open to the occupation of all discoverers, one of the first necessities of a mining neighborhood was to make rules by which this right of occupation should be governed as among themselves; and it was soon discovered that the same person would mark out many claims of discovery and then leave them for an indefinite length of time without further development, and without actual possession, and seek in this manner to exclude others from availing themselves of the abandoned mine. To remedy this evil a mining regulation was adopted that some work should be done on each claim in every year, or it would be treated as abandoned.
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> In the statute we are considering, Congress, when it came to regulate these matters and provide for granting a title to claimants, adopted the prevalent rule as to claims asserted prior to the statute, and as to those made afterwards it required one hundred dollars' worth of labor or improvement to be made in each year on every claim. Clearly the purpose was the same as in the matter of similar regulations by the miners, namely, to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger.

Jackson v. *Roby*, 109 U. S. 440, 27 L. Ed. 990, 3 S. Ct. 301.

After referring to the statute in question the court on page 445 said:

> * * * In other words, the law permits a general system to be adopted for adjoining claims held in common, and in such case the expenditures required may be made, or the labor be performed, upon any one of them.

Departmental Rulings.

The decision of the Utah Supreme Court is inconsistent with the rulings of the United States Department of Interior and General Land Office with respect to the United States statute.

In *Smith, et al.* v. *Van Clief, et al.*, 6 Copp's Land-Owner 2, 3, the Secretary of the Interior stated:

> The purpose of the requirement of the law was to obviate an abuse which has assumed formidable proportions in the mining regions. In the early history of mining operations in this country, it was the universal practice of miners to assemble together and make laws for the government of the mining district where they resided. These laws were generally very liberal in the matter of possessory rights and titles, and great areas of land were covered by duly recorded mining claims, upon which no work had been done or improvements made for a long series of years.
>
> Under the rulings of the local courts these claims operated as a cloud upon the title to the land, and retarded the progress and development of the mining industries of the country. In order, therefore, to put an end to this abuse, and encourage the purchase of the lands, from the government, and the consequent establishment of permanent industries, Congress wisely provided that possessory rights should exist only as long as the specified amount of work was annually performed.
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> The object of the law being to encourage the purchase of mineral lands, it would be manifestly improper for

this Department to so construe the law as to destroy the purpose which Congress had in view in enacting it.

The requirements of the United States statute with regard to application of work performed away from the claim are stated by the Interior Department headnote and decision in the case of *Black Lead Lode Extension*, 32 L. D. 595, 597, as follows:

> No part of the value of work done or improvements made upon a group of contiguous mining claims, in pursuance of a general system alleged to have been adopted for the common development of the group and an adjoining claim, can be accredited to the adjoining claim, toward meeting the requirement of Section 2325 of the Revised Statutes, relative to the expenditure of five hundred dollars, where any of the several owners of said claim is without interest in the group upon which the improvements are located. (Headnote.)
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> The entrymen have not shown, nor do they claim, that the co-owners of Giuliani in the Black Lead Lode Extension ever, at any time, had an interest in the Susquehanna group of claims. There is not and was not at the date of the application for patent, therefore, a common ownership in the claim here in question and the claims composing the Susquehanna group, such as would constitute them a group of claims "held in common" within the meaning of the law. (See Golden Crown Lode, 32 L. D. 217, 220.)

The foregoing case involved patent expenditures, but in the case of *C. K. McCormick, et al.*, 40 L. D. 498, 501, the First Assistant Secretary of the Interior stated:

> In Zephr and Other Mining Claims, (30 L. D., 510, at 513), the Department said:
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> "As, obviously, whatever may be credited as labor or improvements toward meeting the requirement relative to annual expenditure may also be credited toward the expenditure required to be shown by section

2325 as a condition precedent to the entry and patenting of a mining claim, it follows that the provisions of the law relating to annual expenditure, and the decisions of the courts construing or interpreting such provisions, may properly be resorted to to determine what expenditure in labor and improvements may be credited to such a claim or claims under that section."

In Chambers & Others *v.* Harrington & Another (111 U. S. 350), the Supreme Court stated the purpose of the requirement of an annual expenditure on page 353, as follows:

"Clearly the purpose was the same as in the matter of similar regulations by the miners, namely, to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger."

The ruling of the Interior Department in *Cronberg, et al.* v. *Hazlett,* 51 L. D. 101, 106, likewise clearly stated the necessity of common ownership as follows:

Credit toward compliance with the annual assessment work required by section 2324, Revised Statutes, can not be allowed for expenditures upon other claims of a group of which the one under consideration once formed a part, if the claimant had no interest in those other claims at the time that the expenditures thereupon were made. (Official Interior Department Headnote.)

The want of interest by the protestants in the tracts upon which said drilling operations were performed, and at the time of its performance, would, without regard to other objections that might be urged against the availability of the expenditures therefor, defeat the right of the protestants to have any part of such costs credited to the claim here involved as annual assessment work (Page 106).

In public land matters this Court has always given much weight to the rulings of the Interior Department.

Cramer v. *U. S.*, 261 U. S. 219, 43 S. Ct. 342, 344, 67 L. Ed. 622.

Midway Co. v. *Eaton*, 183 U. S. 603, 609, 22 S. Ct. 261, 264, 46 L. Ed. 347.

Hastings, etc. R. R. Co. v. *Whitney*, 132 U. S. 357, 366, 10 S. Ct. 112, 33 L. Ed. 363.

Other Authorities.

The Supreme Court of Idaho in *Kramer* v. *Settle*, 1 Idaho 485, 492, stated:

> It is a matter of public notoriety that the enterprise of many who might wish to work mines, is often discouraged by a mere location of another, with but a slight amount of work performed and more especially, when it is considered that there is a public sentiment among miners that no one shall be permitted to jump such claims with impunity. Under such discouragement, labor and capital are diverted into other channels, and the law relating to mines is in this way made subsidiary, not to the interests of the laborious, enterprising miner, but to those of the idle prospector or the scheming capitalist. It is better to hold that the title to these mines shall be made to depend upon the work to be performed within the statutory limitations, than to put such a construction upon the law as will favor only those who are not laboring diligently and in apt time to develop the riches which lie hidden in the earth.

The same court in *Lockhart et al.* v. *Rollins*, 2 Idaho 540, 21 Pac. 413, 415, said:

> His right of possession does not depend upon any money consideration, but it is a right founded in public policy. It would be clearly against public policy for one to take and hold a mining claim for years, against all others who would be locators, merely that he might

> speculate upon it, with perhaps no design to devolop it. Some guaranty of his good faith is required, as a condition of allowing him such exclusive possession.

In *Hawgood* v. *Emery*, 22 S. D. 573, 119 N. W. 177, the plaintiff and defendant owned two unpatented claims in common. Defendant did work on claims owned in common with plaintiff and in accordance with Title 30, U. S. Code Sec. 28 undertook proceedings to forfeit plaintiff's interest because of plaintiff's failure to contribute his proportion of the cost of the work. Plaintiff brought the action to enjoin the defendant from such forfeiture procedure. Plaintiff offered to prove that he had himself performed assessment work for the two claims in question, his work having been performed on two adjoining claims owned solely by plaintiff and on three adjoining claims owned by plaintiff and third parties. The plaintiff's offer of proof was excluded. The South Dakota Supreme Court said: (P. 178)

> It will be seen, therefore, that the rulings of the court in excluding the testimony sought to be introduced by the plaintiff was error, providing that, under the facts above set forth, the plaintiff would have any right to have his work credited on the claims in litigation.

The court held the work could not be credited, stating the necessity for common ownership of the several claims or of the workings as follows:

> I think it is well settled both by the decision of this court found in *Godfrey* v. *Faust*, 20 S. D. 203, 105 N. W. 460, and under the holdings in 2 Lindley on Mining, Secs. 630-631, together with the long line of authorities cited by our court, and also by Lindley, as well as the authorities cited by both parties of this appeal, that, where a person or persons hold several claims that are adjacent, work can be done on one claim and be credited on the other claims; also, that work can be done outside

of the limits of the claim, and have it credited on such claim where such work is beneficial to the claim, and that this is true even if there are several claims for which credit is asked for said outside work, provided said several claims are held in common; also, that, where there are several claims adjacent held by different persons and work beneficial to all of said claims can best be done on one of them, then, under a proper agreement between the owners of said claims, development work can all be done on one claim, and be credited to the several claims, such work being a part of the general plan or scheme for the development of the several claims.

Lindley on Mines, Third Edition, Section 630, Vol. 2, page 1552, states the rule as follows:

> There must be a community of interest in each claim. This interest need not be of a strictly legal nature, and different owners of adjoining claims can undoubtedly join in an agreement whereby a single shaft may be sunk or a tunnel driven on one of the claims for the joint benefit of the respective claims, even though not owned in common, and this will count as assessment work on all of the claims actually benefited, as being a part of a general plan or scheme of development. But in the absence of such an agreement a cotenant in the group of claims cannot claim for them the benefit of work done by him on another claim or claims in which his co-owner has no interest.

Snyder on Mines, Vol. 1, page 444, Section 480, states the rule as follows:

> • • • Essential to the application of this doctrine, however, there must be a community of interest in the particular development work so that each owns a permanent interest therein, or there must be a community of interest in the claims benefited, and the work done on one for all, or there must be identity of ownership in the work done and the claims benefited, and this must be a bona-fide permanent ownership.

In *Lindley on Mines*, Third Edition, Vol. 2, Sec. 624, pages 1532-1533, it is stated:

> While a timely resumption of work may prevent a relocation, the law contemplates that the labor or improvements, actual and valuable, to the amount of one hundred dollars in each year, computed from the first day of January next succeeding the date of location, should be performed in good faith. There is probably no single provision of the law which is evaded to a greater extent than this one. While, of course, there are many exceptions, the average locator exhausts his ingenuity in attempting to avoid this plain and wholesome requirement. The courts are disposed to deal with these drones in the hive with much more leniency than they deserve. The statute is too frequently applied on sentimental lines. Forfeitures, say these tribunals, are odious, and in many cases the reluctance with which they enforce the law encourages, rather than deters, the systematic evasion of it. * * * It would seem that a more rigid enforcement of the rule would not only command more respect for the law, but would, in a great degree, tend to promote the general object and intent of the mining statutes—the development of the mining resources of the country.

This Petition Presents a Question of General Importance Which Should Be Decided By This Court.

The purpose and policy of the United States statute requiring annual assessment labor is to require the holder of unpatented mining claims to give a substantial guarantee of good faith and to discourage the holding of mining claims without development or intention to develop, to the exclusion of those who might otherwise locate and work the ground. It is to prevent locators from pursuing a dog in the manger policy.

The importance of mining in the public land States is well known. The construction and application of the United

States statute are of outstanding importance throughout these western States. Fundamental questions of title depend thereon. Upon them also will depend whether vital mineral resources shall be developed or remain undeveloped.

To construe the United States statute as the Utah Supreme Court has done is to further liberalize an already liberal statute, defeat its purpose, present unjustified opportunities for abuse and encourage subterfuge and evasion. Under that ruling those who are unwilling to do annual assessment work avoid the necessity by the mere expedient of granting a lease to someone operating on a neighboring property. Large areas can thus be controlled without anything but paper work being done. Monopoly of national mineral resources is thus fostered.

It is respectfully submitted that this Court should decide which interpretation of the United States statute is correct, that of the Interior Department and supreme courts other than Utah, or that of the Supreme Court of Utah. Thus, claimants of unpatented lode mining claims may know what assessment work is necessary and disturbing uncertainty as to mining titles will be avoided.

Conclusion.

Petitioner prays that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

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